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No. 774

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

STATE OF GEORGIA, WESTERN & ATLANTIC RAILROAD, and LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Appellants*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

On Appeal From the United States District Court for the Northern District of Georgia

## MOTION TO AFFIRM

HENRY L. WALKER,
ARTHUR J. DIXON,
JAMES A. BISTLINE,
Southern Railway Building,
P. O. Box 1808,
Washington 13, D. C.,
*For Appellees.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Preliminary Statement | 2 |
| The Statutes Involved | 3 |
| Questions Presented | 3 |
| The Questions Presented by Appellants Are Not Substantial and, As a Practical Matter, Have Been Rendered Moot | 4 |
| Statement of the Case | 5 |
| The Interstate Commerce Commission Was Correct in Finding, and the District Court Below Correct in Affirming, That Under the Doctrine of the Texas & Pacific Case the Commission Had Jurisdiction Under Section 1(18) of the Act | 11 |
| The Findings of the District Court on the Scope of Judicial Review of the Jurisdictional Determination by the Interstate Commerce Commission Were Proper and Should Be Affirmed | 21 |
| Conclusion | 25 |


## CITATIONS

CASES:


| | |
|---|---|
| Chicago, Milwaukee, St. P. & P. R.R. v. Northern Pac. R.R., 120 F. Supp. 710; 225 F.2d 840 | 11, 12 |
| Cramet, Inc. v. Alabama Great Southern R. Co., 298 I.C.C. 439 | 14 |
| East Texas Lines v. Frozen Food Exp., 351 U.S. 49 | 23 |
| Gray v. Powell, 314 U.S. 402 | 22 |
| Missouri, Kansas & Texas R. Co. v. Texas & N. O. R. Co., 172 F.2d 768 | 19 |
| Missouri Pac. R. Co. v. Chicago, R. I. & P. R. Co., 41 F.2d 188 | 16 |
| Missouri Pac. R. Co. v. St. Louis Southwestern Ry., 73 F.2d 21 | 11 |
| Nashville, Chattanooga & St. Louis Ry. et al., Construction, 295 I.C.C. 363 | 2, 5, 6, 7, 8, 9, 10, 13, 15 |

Page

Pennsylvania R. Co. v. Reading Co., 266 F.2d 958; 132 F. Supp. 616 ..... 19
Social Security Board v. Nierotko, 327 U.S. 358 .. 23
Southern Pac. v. Western Pacific California R.R., 61 F.2d 732 ..... 11
Southern Railway Co. v. United States, 154 F. Supp. 562; 355 U.S. 370 ..... 14
Texas & Pacific Ry. Co. v. Gulf, C. & S. F. Ry. Co., 270 U.S. 266 ..... 4, 11, 12, 14, 16, 18, 21
Union Pacific R. Co. v. Denver & R. G. W. R. Co., 198 F.2d 854 ..... 11, 19
United States v. Idaho, 298 U.S. 105 ..... 22, 23
Yonkers v. United States, 320 U.S. 685 ..... 23

STATUTES:

Judicial Code:

28 U.S.C., Sec. 2284 ..... 2
28 U.S.C., Sec. 2325 ..... 2

Interstate Commerce Act:

49 U.S.C., Sec. 1(18) ..... 3, 4
49 U.S.C., Sec. 1(22) ..... 3

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## MOTION TO AFFIRM

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Appellees, Southern Railway Company, The Cincinnati, New Orleans and Texas Pacific Railway Company,[1] and Georgia Industrial Realty Company,[2]

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[1] An affiliate of Southern Railway System, controlled by Southern Railway Company.

[2] Wholly-owned real estate subsidiary of Southern Railway Company.

pursuant to Rule 16, Paragraph 1(c), of the Revised Rules of this Court, move that the final judgment of the District Court be affirmed.

The Interstate Commerce Commission and the United States of America, appellees in this proceeding, also have filed a motion to affirm.

## PRELIMINARY STATEMENT

This is a direct appeal from the final judgment of a three-judge District Court (convened pursuant to 28 U.S.C., 2284 and 2325) which upheld the validity of the report and order of the Interstate Commerce Commission of September 4, 1956, and the order of February 12, 1957, in Finance Docket No. 18942, *Nashville, Chattanooga & St. Louis Railway, etc. Construction.* (Appendices B-1, C-1, and D-1 to Appellants' Jurisdictional Statement.) The report and order dated September 4, 1956 (295 I.C.C. 363), overruled the motion of Louisville and Nashville (L&N)[3] to dismiss for lack of jurisdiction and denied the authority sought by the application. The order of February 12, 1957, denied the petition of L&N for reargument and reconsideration. The decision of the Court below is reported in 156 F. Supp. 711.

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[3] The original application with the Commission was filed by Nashville, Chattanooga & St. Louis Railway (NC&StL) and Western & Atlantic Railroad, leased to NC&StL by the State of Georgia. The proposed trackage would be a part of the leased Western & Atlantic. NC&StL has now been merged into L&N which is now lessee of Western & Atlantic. The term "appellants" will be used herein to designate the lessee railroad and lessor State of Georgia collectively, unless otherwise designated.

## THE STATUTES INVOLVED

The questions presented arise under the provisions of the Interstate Commerce Act governing the construction of new lines of railroad and extensions of existing lines, and spur, industrial and other trackage. 49 U.S.C., Section 1(18) and 1(22). The statutes are reproduced in full in Appendix E to the Jurisdictional Statement.

## QUESTIONS PRESENTED

The appellants, subsequent to filing an application with the Commission for authority to construct the proposed trackage under Section 1(18), filed a motion to dismiss on the grounds that the Commission had no jurisdiction over the application under Section 1(22).

In the complaint in the court below appellants contended that the Commission erred in finding it had jurisdiction under Section 1(18), and also argued that even if the Commission had jurisdiction it erred in finding that the public convenience and necessity had not been shown to warrant the construction of the proposed trackage. However, upon argument in the court below, appellants apparently abandoned their attack upon the Commission's finding with respect to public convenience and necessity. The court below found that on the issue of public convenience and necessity the findings of fact by the Commission were supported by substantial evidence in the record and the decision of the Commission was affirmed (Appendix A-13, Jurisdictional Statement). Appellants' Jurisdictional Statement ~~also~~ apparently abandons any attack on the issue of public convenience and necessity.

Appellants' Jurisdictional Statement (pp. 4-6) presents four questions which, in substance, resolve themselves into two general issues, namely:

> 1. Do the principles promulgated by this Court in *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266 (1925), with regard to the determination of what is an "extension of line" within the meaning of Section 1(18) of the Interstate Commerce Act, support the determination of the Commission, and the affirmance by the court below, that the proposed trackage is an extension of line over which the Commission has jurisdiction?
>
> 2. Was the court below correct in the scope of judicial review given the Commission's determination that it had jurisdiction?

The subsidiary questions presented by appellants fall under these two general questions.

## THE QUESTIONS PRESENTED BY APPELLANTS ARE NOT SUBSTANTIAL AND, AS A PRACTICAL MATTER, HAVE BEEN RENDERED MOOT

Appellants, in substance, are asking this Court to restrict the doctrine of the *Texas & Pacific case* in a manner that would severely limit the jurisdiction of the Interstate Commerce Commission. The Commission has the statutory responsibility for preserving the economic welfare and strength of the railroad transportation industry. It is peculiarly competent to determine whether or not additional railroad construction is necessary or wasteful. Appellants, here, in attempting to have the Commission's jurisdiction drastically restricted, seek to evade the necessity of

obtaining a certificate of public convenience and necessity for new railroad construction, which authority the Commission has denied on the merits.

Furthermore, the issues here are moot, for all practical purposes, since appellants, by means of reciprocal switching, effective October 25, 1957, are able to compete for the traffic at the industries to which they seek to construct new trackage.

## STATEMENT OF THE CASE

The facts in this proceeding are not disputed. It is the interpretation and legal significance of these facts which give rise to the questions on appeal. The report of the Commission, at 295 I.C.C. 363 (pp. 364-375), sets forth in detail the findings of fact involving the proposed trackage. We need not repeat here these findings in detail, but for clarity will merely summarize the evidence supporting the more essential findings.

Attached as Appendix A to this motion is a reproduction of Exhibit H-5 from the record before the Commission. It portrays the Boyce area with present trackage, proposed trackage, and the various industries therein. The main line of Southern's affiliate, the CNO&TP, as well as the tracks reaching the industries in the Boyce area, are all owned and operated by CNO&TP as part of Southern Railway System. Hereinafter we will usually refer to this trackage as that of Southern so that references will be consistent with the terminology used by the Commission and the court below.

The proposed line would spring off the main line of appellants approximately 5½ miles north of

the Chattanooga terminus of the appellants' Atlanta-Chattanooga line. The proposed line, shown in yellow on Appendix A, would first cross over 3 main-line tracks of Southern by means of an overhead bridge and proceed 4.04 miles through an industrial territory generally known as the Boyce area and, according to the appellants' plan, crossing at grade, other tracks of Southern at least 4 times (Tr. 53; Ex. H-1, 5 and 6). The proposed line is designed to gain physical access to the industries now located in the Boyce area and physically being served by Southern, as well as any future industries that might locate on industrial land developed by Southern (295 I.C.C. at 365).

The estimated cost of the proposed line is $523,916 and applicants propose to acquire most of the right-of-way by condemnation of land now owned by Southern's real estate subsidiary, Georgia Industrial Realty Company (GIR) (Tr. 23, 56). The estimated cost of the land to be acquired by condemnation from Southern's subsidiary is $125,000 (Tr. 59). The last 2 miles of the proposed 4 miles would be composed of a segment to serve a Quaker Oats plant only and would run, except for a short distance, through land owned by GIR.

The Boyce industrial area contains about 895 acres of industrial property. GIR owns a total of 764 acres of this area which it has acquired for industrial development at a cost of $1,172,842 (Ex. H-5, H-8; 295 I.C.C. at 365).

The record shows that appellants have never served the Boyce industrial area by means of trackage built into this area and that the River track of Southern,

servicing the industries in the Boyce area, has been in existence at least since 1898. The various industries in Boyce have always been served by this track with the exception of the new Quaker Oats plant, which is served by short line springing from Southern's Citico Yard and built in 1952 (Tr. 286).

The recently rebuilt and expanded Citico Yard of Southern Railway System embraces substantial territory in the southeastern portion of the Boyce area. The yard itself is between the main lines of L&N and Southern and the Boyce area, except at the northern portion of the Boyce area. The River track of Southern springs off the Southern main line and proceeds in a southwesterly direction towards the Tennessee River and is shown in yellow on Appendix A. For many years there have been a number of industries served by Southern by means of this River track at Boyce. Proceeding westerly the first two are the Blanchard Company served since at least 1934, and the Chattanooga Royal Company served at least since 1913 (Tr. 286, 320, 321; 295 I.C.C. at 365).

The third industry on the track is the new titanium metal plant of Cramet Company, built in 1954 at a cost of $25,000,000. Adjacent thereto is the proposed site of the Heavy Minerals plant. The fourth industry is H. L. Judd, which has been served by the River track for many years. At the end of the River track is the new plant of Central Soya Company, built in 1954 at a cost of more than $7,000,000 (Tr. 321, 322). Thus, for many years the River track of Southern has been the only line of railroad physically serving the industries on that line. The Quaker Oats plant, built in 1952 at a cost of more than $1,000,000, has been served since its inception by Southern by means

of a short industrial track springing from the southwest side of the Citico Yard (Tr. 281; 295 I.C.C. at 366, 367).

Boyce, Tenn., is a local agency station on Southern 5.5 miles north of Chattanooga. It has been a local station on Southern for over thirty years and Southern has an agency station at Boyce. Some years ago appellants and Southern maintained a joint agency station at Boyce, but this joint agency has been abandoned. *The appellants do not have, nor have ever had, any track physically reaching the industries at Boyce* (Tr. 20, 26, 320).

Exhibit H-13 shows that in 1953 Southern Railway System received gross revenue of $350,812 on inbound and outbound shipments from industries located on the River track and from Quaker Oats. This figure rose to $414,053 in 1954, and for the first six months of 1955 amounted to $204,680. For the three-year period, July 1, 1952, through June 30, 1955, Southern received gross revenue of $1,068,464 from the industries located on Southern's tracks at Boyce.

The Commission found, based upon appellants' evidence, that appellants expect to derive substantial traffic and gross revenue from the plants of Quaker Oats, Central Soya, Cramet and Heavy Minerals as follows, if the proposed track is built (295 I.C.C. at 370):

| | Tons of Freight | Gross Freight Revenue |
|---|---|---|
| 1956 | 159,273 | $ 685,685 |
| 1957 | 178,986 | 763,426 |
| 1958 | 225,997 | 932,444 |
| 1959 | 245,773 | 1,008,496 |
| 1960 | 257,593 | 1,072,906 |

Southern owns 764 acres out of a total of about 895 acres of industrial property in the Boyce area suitable for additional industrial development and it is obvious that Southern can expect substantially larger gross revenues than at present if the appellants are not permitted to divert traffic by means of the proposed line (Tr. 327).

Prior to 1939, the Boyce area, while it did have the smaller industries previously referred to on the River track of Southern, was not attractive for large industrial development because of periodic flooding of the Tennessee River. The completion of the Chickamauga Dam by the Tennessee Valley Authority, just north of Boyce, in 1939, removed the danger of flooding and thereafter Southern recognized the industrial potential of this area and proceeded to attempt to locate industries there (295 I.C.C. at 365).

Southern has spent $92,906.61 in constructing turnouts from the River track into the new industries (Ex. H-9).

During this period when Southern was expending these sums with the foresighted determination of protecting this area for industrial development, as distinguished from residential development, the appellants did not spend one cent or make any effort whatsoever to develop the Boyce area for industrial purposes. Witness Whittemore, of appellants, was asked and answered (Tr. 24):

> "Q. * * * It is true, is it not, Mr. Whittemore, that the Nashville, Chattanooga & St. Louis Railway Company has not made any expenditures in this area to develop it for industrial purposes?
>
> "A. That is correct so far.

"Q. In other words, for 15 years since the Chickamauga Dam was built, you have done nothing to develop this as an industrial area?

"A. No, sir."

On the contrary, appellants attempted to forestall certain industries from locating at Boyce which eventually did locate at Boyce on the Southern. Witness Toal, for appellees, testified (Tr. 259):

"Q. Mr. Toal, did Southern Railway suggest and support the area under consideration as a location for the Quaker Oats, Central Soya, and Cramet plants?

"A. Yes. Directly or indirectly, the Southern suggested these sites for all of the recently located industries in the area.

"Q. Did the NC&StL, which now claims it as an area entitled to service by the NC&StL, support these efforts?

"A. It did not. On the contrary, it made every effort to locate the Cramet plant at Nashville, Tennessee; it endeavored to locate the Quaker Oats plant, after a decision had been made to come to the Chattanooga area, near the TVA dock area. I am not familiar with what, if anything, it recommended to Central Soya."

Witness Burke, who was in charge of industrial development for appellants, admitted that appellants attempted to locate Cramet at Nashville, Tenn. (Tr. 109).

The Commission made extensive findings on the evidence submitted both on the jurisdictional issue and on the issue of public convenience and necessity (295 I.C.C. at 375-377 and 365-374 respectively).

## THE INTERSTATE COMMERCE COMMISSION WAS CORRECT IN FINDING, AND THE DISTRICT COURT BELOW CORRECT IN AFFIRMING, THAT UNDER THE DOCTRINE OF THE TEXAS & PACIFIC CASE THE COMMISSION HAD JURISDICTION UNDER SECTION 1(18) OF THE ACT

In *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266 (1925), this Court set forth the principles governing the determination as to whether a proposed track is an "extension" under Section 1(18). The conclusions of the Court, speaking through Mr. Justice Brandeis, in particular at pages 277-278, have been the governing law since that time.

The doctrine of *Texas & Pacific* has been followed down through the years in the hundreds of cases before the courts and the Commission on the determination of whether a proposed track is an extension, giving the Commission jurisdiction. *Union Pacific R. Co.* v. *Denver & R. G. W. R. Co.*, 198 F.2d 854 (1952); *Southern Pac.* v. *Western Pacific California R.R.*, 61 F.2d 732 (9th Cir. 1932); *Missouri Pac. R.R.* v. *St. Louis Southwestern Ry.*, 73 F.2d 21 (8th Cir. 1934); *Chicago, Milwaukee, St. P. & P. R.R.* v. *Northern Pac. R.R.*, 120 F. Supp. 710 (W.D. Wash. 1954).

The determination whether a proposed track is an "extension" is not a narrow, technical adjudication as appellants argue. Whether a track is substantial or invades new territory adequately served by another carrier requires an evaluation of the economic consequences to the serving carrier and the possibility of wasteful or excessive transportation which may be inimical to the national transportation system.

In *Chicago, M. St. P. & P. R. Co.* v. *Northern Pacific R. Co.*, 120 F. Supp. 710, *affirmed* 225 F. 2d 840 (9th Cir. 1955), the Circuit Court said:

> "It appears to be well settled that the Court must give a liberal or broad construction to the word 'extension' and a limited or narrow construction to the words 'spur' and 'industrial' as applied in the Transportation Act to proposed railroad tracks. Lancaster v. Gulf C. & S. F. Ry. Co., D.C., 298 F. 488 at page 490; Texas & Pac. Ry. Co. v. Gulf, C. & S. F. Ry. Co., 270 U.S. 266, 46 S. Ct. 263, 70 L.Ed. 578; Piedmont & Northern Railway Co. v. Interstate Commerce Commission, 286 U.S. 299 at page 311, 52 S.Ct. 541, 76 L.Ed. 1115; Interstate Commerce Commission v. Piedmont & Northern Railway Co., D.C., 51 F.2d 766 at page 774."

Appellants argue that the *Texas & Pacific case* does not control here because (a) no part of the Boyce area is new territory to appellants; (b) competition is not a factor in appellants' proposal because they already actively compete as originating carrier for the Boyce traffic through reciprocal switching; and (c) the facts and circumstances giving rise to the rule in *Texas & Pacific* were essentially different from those involved at Boyce and consequently furnish no basis for applying it in this case. None of these arguments is sound.

The argument that the *Texas & Pacific* doctrine never comes into play in the present case is based upon the single sentence in Justice Brandeis' opinion which states:

> "If the purpose and effect of the new trackage is to extend substantially the line of a carrier into *new territory*, the proposed trackage constitutes an extension of the railroad, within the meaning

> of paragraph 18, although the line be short and although the character of the service contemplated be that commonly rendered to industries by means of spurs or industrial tracks." (270 U.S., at p. 278.) (Emphasis supplied.)

Appellees answer that the doctrine of *Texas & Pacific* is determined by reading the entire decision. The terms "new territory" and "territory not theretofore served by the carrier" must be defined by the rationale of the entire opinion.

The Commission found, on the facts in the present case, that "the applicant cannot justly claim that the area is within its territory on the strength of the mere showing that it serves the general area. The locations of the industries are such that the applicant's main line would be extended a distance of over four miles in order to reach them." (295 I.C.C. at 377.)

Appellants in their Jurisdictional Statement, page 8, contend that their alleged service in the Boyce area is rendered by (1) a public team track, and (2) reciprocal switching.

The team track argument can be summarily disposed of: A public team track may be used by anyone for the receipt of freight. It is unlikely that the smaller industries at Boyce which have been served by Southern's River track throughout the Boyce area since at least 1898 would choose to take delivery at a team track located some distance away when they were already served by tracks leading into their plants. It is equally unlikely that the large industries which located at Boyce on Southern's tracks beginning in 1952 would ever have occasion to receive their freight upon a team track when they were served by direct

track connections. There is no evidence in the record that any of the industries in the Boyce area specifically used the team track.

Under appellants' argument it would be possible for an industry at Boyce to take delivery on a team track at some distant point in a large metropolitan area like Chattanooga and then argue that since the carrier owning the public team track was, in fact, serving the industry at a distant point it was serving them at Boyce and could build a direct track connection. This argument upon its face would lead to absurd results if used to defeat the jurisdiction of the Interstate Commerce Commission under the *Texas & Pacific* doctrine.

Appellants also argue that they already serve the area by means of reciprocal switching. Reciprocal switching, by which appellants were able to reach the industries in Boyce by using Southern as an agent to do their switching, was applicable to the Boyce industries prior to June 23, 1954, when Southern cancelled reciprocal switching to industries on the River track at Boyce. However, as the result of a complaint to the Commission in Docket No. 31737. *Cramet, Inc.* v. *Alabama-Great Southern R. Co. et al.* (298 I.C.C. 439), the Interstate Commerce Commission ordered the establishment of reciprocal switching on or before October 25, 1957. The Commission's action was upheld in *Southern Railway Co. et al.* v. *United States, et al.*, 154 F. Supp. 562 (U.S.D.C. Va. 1957), which judgment was affirmed by this Court in No. 579 on January 13, 1958 (355 U.S. 370).

The establishment of reciprocal switching to the new industries on the River track at Boyce, in one sense,

makes the appeal in this proceeding moot. When appellants filed their application with the Commission to construct the new trackage into the Boyce area, reciprocal switching was not available to the industries on the River track and was provided only to the Quaker Oats plant in the southwest corner of Boyce, as shown on the map in Appendix A. Thus, appellants have been seeking in two separate proceedings to secure either a new line of railroad into Boyce or reciprocal switching. The Interstate Commerce Commission in its report considered this matter as follows:

> "Witnesses for the industries in the Boyce area have not seriously disputed the adequacy of the Southern's service, and their testimony indicates that they want another line of railroad primarily for bargaining purposes. The industries served by the Southern's river track support the application almost entirely for the reason that they are not accorded reciprocal switching. Practically all of their existing difficulties, including adequate transit privileges, will be satisfied if they are accorded reciprocal switching, and that matter is before the Commission and will be determined in an appropriate proceeding. Vague references to obtaining a more dependable car supply are not convincing." (295 I.C.C. at 378.)

Now that appellants are able to reach the industries at Boyce by using Southern as an agent to switch appellants' cars to the Boyce industries, the pursuance of appellants' application to build a new line of railroad is, in fact, asking this Court to approve a costly duplication, authority for which on the merits has been denied by the Interstate Commerce Commission and upheld by the court below.

The issue as to whether reciprocal switching is the type of "service" which would nullify the rule in *Texas & Pacific* has been passed on in *Missouri Pacific R. Co.* v. *Chicago, R. I. & P. R. Co.*, 41 F.2d 188 (8th Cir. 1930). In that case, the Missouri Pacific sought to build across certain property and tracks of the Rock Island into an industrial area which the Rock Island was serving. *The Missouri Pacific was already able to reach the territory by reciprocal switching performed for it by the Rock Island.* The court cited *Texas & Pacific* as controlling and enjoined the construction unless a certificate of public convenience and necessity was obtained.

More important than any precedent in this matter is the practical effect of adopting the argument of appellants that if there is reciprocal switching into an area, the Interstate Commerce Commission cannot have jurisdiction under the doctrine of *Texas & Pacific* as related to Section 1(18). It is a well-established fact that in most large metropolitan areas today reciprocal switching exists in varying degrees. If appellants' argument is accepted, then it would be possible for any rail carrier, where there was reciprocal switching, to build an extension of railroad to any plant which had reciprocal switching. The Interstate Commerce Commission would never have an opportunity to examine whether such construction would have a disastrous effect upon other rail carriers and would be wasteful and a duplication of facilities.

The doctrine of *Texas & Pacific* in defining the jurisdictional boundaries of the Commission's authority has provided for many years a sound basis for the administration of Section 1(18) and 1(22) of the Interstate Commerce Act. The appellants'

argument would emasculate the powers of the Commission and undo many years of sound judicial and administrative precedent in this important field. The adoption of the appellants' theory would have widespread repercussions in the railroad industry as a whole and cause results that even appellants would not advocate. Furthermore, the national transportation system would be greatly weakened by such unfettered construction and duplication, with the Interstate Commerce Commission powerless to act in the premises.

Appellants' argument that competition is not a factor at Boyce because they already actively compete through reciprocal switching as an originating carrier for the Boyce traffic is disposed of by appellants' own evidence with respect to the large amount of traffic they hope to secure from the new industries in the Boyce area. The Commission found that from 1956 through 1960, appellants expected to derive substantial traffic and gross revenue, increasing each year, as shown by the evidence (295 I.C.C. at 370; Appendix B-11, Jurisdictional Statement). Appellants contend that they are already in competition for this traffic through reciprocal switching. It is obvious that appellants do not think they can secure this substantial traffic without the construction of a new line of railroad. The court below said on this point:

> "The fact remains that the L&N does not consider this service adequate; otherwise it would accept the status quo and not now seek to spend a half million dollars to push its track in the area." (156 F. Supp. at 718).

The argument of appellants is self-defeating for they contend that the territory is not new and that

they are already in position to compete for all the traffic, yet they continue to press for the construction of the new track. Realizing fully that the record would never support a finding of need under public convenience and necessity, they seek to attain this goal by removing the Interstate Commerce Commission from a consideration of the facts.

Appellants' further argument (Jurisdictional Statement, pp. 20-21) that the facts and circumstances in *Texas & Pacific* were different from those involved at Boyce will be commented upon briefly.

Doubtless it would be possible always to distinguish the exact facts in *Texas & Pacific* from the exact facts in any other particular case. However, the doctrine of *Texas & Pacific* must be viewed in its broadest aspect to give any meaningful purpose thereto. The fact that applicant in *Texas & Pacific* had no branch line as near as the line of appellants here to the area sought to be served is not significant. All that appellants really are saying is that because they are closer to Boyce they have a vested right to serve Boyce. The argument that in *Texas & Pacific* the industries sought to be served were well established and long standing, while at Boyce the larger industries are new in the area, is not significant. It is true that the new industries at Boyce are substantial, but they are located on tracks of appellees which have been in service for over a half century. The argument that in *Texas & Pacific* all traffic available to the proposed line would be diverted from the existing carrier, whereas at Boyce this would not be true because appellant is now handling some of the traffic, is not supported by the evidence. The record does show that appellants did receive some traffic from Quaker

Oats under reciprocal switching, but it does not show any traffic from the other industries at Boyce for the simple reason that since the construction of these new industries reciprocal switching was not available until October 25, 1957.

On brief before the Commission and before the District Court these appellees cited a number of cases in which the proposed trackage was found to be within the purview of Section 1(18). The Commission found that the facts involved in the instant proceeding from a jurisdictional standpoint more closely resembled those in *Union Pacific R. Co.* v. *Denver & R. G. W. R. Co.*, 198 F.2d 854 (1952), than the facts in *Pennsylvania R. Co.* v. *Reading Co.*, 226 F.2d 958, affirming 132 F. Supp. 616. A study of the *Union Pacific case* indicates it is more analogous to the case here than either *Pennsylvania* v. *Reading* or *Missouri, K. & T. R. Co.* v. *Texas & N. O. R. Co.*, 172 F.2d 768.

The court below answered the contentions of appellants that the Boyce territory was not "new" territory to the L&N, as follows:

> "* * * We are unable to avoid the conclusion that findings that the proposed expenditures would merely duplicate present facilities and that such unnecessary duplication would be inimical to the public interest has a bearing on our determination of what is a substantial extension into new territory. It is *new territory* to the L&N because the L&N is not now serving it in the sense in which the court used the word 'serve' in the Texas and Pacific case or in the sense in which the Southern is now serving it. It is a *substantial* extension because it involves substantial expenditures and runs a substantial distance. We think that the building of new tracks of significant

mileage comes within the jurisdiction of the Commission when it involves a substantial expenditure of funds to duplicate existing adequate facilities to tap an area of industrial potential which it cannot now serve from its own facilities if such expenditure or the competition resulting therefrom might be a burden on the public. This is such a case.

"The L&N argues that this territory cannot be new to it because it has always held itself out to serve the area both by the presence of its main line, and the team track (which is all that was needed for a century) and because of the reciprocal switching arrangement between it and Southern. The fact remains that the L&N does not consider this service adequate; otherwise it would accept the status quo and not now seek to spend a half million dollars to push its track into the area. Moreover plaintiffs do not take the position that the mere existence of a reciprocal switching agreement constitutes such service as would prevent any area covered thereby from becoming a new territory as to a connecting carrier. Since the reciprocal switching agreement does in the broadest sense of the term result in the L&N 'serving' all the industries that are on the Southern's industrial track within the switching area, this is an implied admission that the term 'serve' in Texas & Pacific means something more than the type of service that is here furnished by it.

"We deduce from the facts in the Texas & Pacific case that the use of the word 'served' there comprehended serving by means of its own substantial facilities which would be expensive to duplicate. In that sense the L&N cannot claim that it is now 'serving' the territory and hence it is not new to it." (156 F. Supp. at 717-718.)

These findings are a sound application of the *Texas & Pacific* doctrine to the facts in the present proceeding and this Court should affirm.

## THE FINDINGS OF THE DISTRICT COURT ON THE SCOPE OF JUDICIAL REVIEW OF THE JURISDICTIONAL DETERMINATION BY THE INTERSTATE COMMERCE COMMISSION WERE PROPER AND SHOULD BE AFFIRMED

The District Court considered fully the jurisdictional facts upon which the Commission determined it had jurisdiction. Appellants base their allegation of error on the scope of review on two sentences in the decision, namely:

> "The basic facts on which the jurisdictional question must be resolved are not in dispute. They are supported by substantial evidence and are therefore not subject to review by this Court." (156 F. Supp. at 713.)

However, the District Court made the following additional statements upon the scope of review which are pertinent:

> "We think that when such facts are found by the Commission based on substantial evidence on the record as a whole we may not set them aside. It is clear here that these findings are supported by the evidence. Although these findings were made by the Commission in connection with the merits of the application for certificate of convenience and necessity they stand in the record for whatever purpose they may serve on the jurisdictional question as well."
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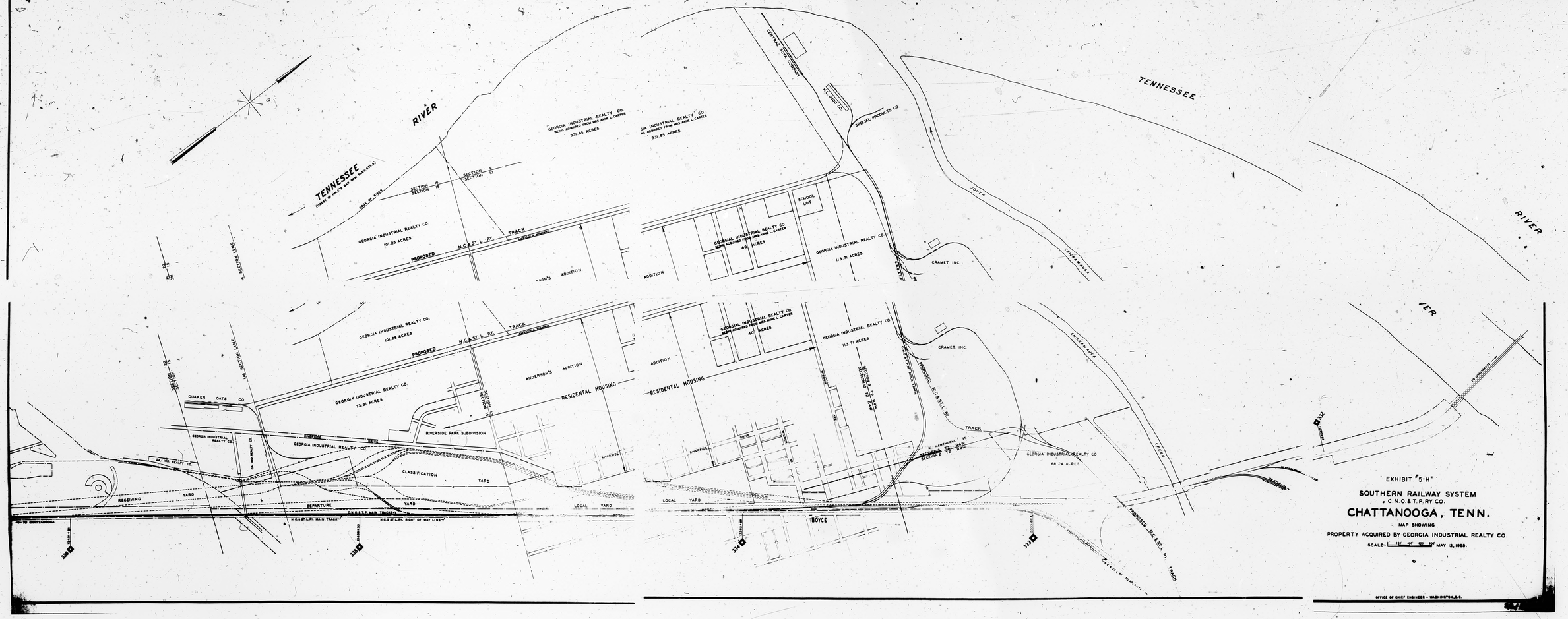
> "We have considered these and the other cases cited by the plaintiffs in support of their conten-


TENNESSEE
(LINE OF STATE BAR BAR 630.0)
STATE OF TENNESSEE
RIVER
GEORGIA INDUSTRIAL REALTY CO.
BEING ACQUIRED FROM MRS ANNE L. CARTER
331.85 ACRES
SECTION 16
SECTION 9
GEORGIA INDUSTRIAL REALTY CO.
101.25 ACRES
PROPOSED N.C.&ST.L. RY. TRACK
CENTRAL SODA COMPANY
L.C.L. 2020 OF
SPECIAL PRODUCTS CO
SCHOOL LOT
GEORGIA INDUSTRIAL REALTY CO.
MRS ACQUIRED FROM MRS ANNE L. CARTER
40 ACRES
GEORGIA INDUSTRIAL REALTY CO
113.71 ACRES
CRAMET INC.
TENNESSEE
RIVER
ANDERSON'S ADDITION
QUAKER OATS CO.
RIVERSIDE PARK SUBDIVISION
RESIDENTIAL HOUSING
CLASSIFICATION YARD
RECEIVING YARD
DEPARTURE YARD
LOCAL YARD
RIVERSIDE DRIVE
BOYCE
PROPOSED N.C.&ST.L. RY. TRACK
TO CHICKAMAUGA
EXHIBIT "5-H"
SOUTHERN RAILWAY SYSTEM
C.N.O.&T.P.RY CO.
CHATTANOOGA, TENN.
MAP SHOWING
PROPERTY ACQUIRED BY GEORGIA INDUSTRIAL REALTY CO.
SCALE: 1" = 100' MAY 12, 1958.
OFFICE OF CHIEF ENGINEER - WASHINGTON, D.C.

> tions that we should determine on the record that this is not an extension of the line of the L&N. In light of the finding of the Commission of the basic facts set out above we do not believe that this case is controlled by any of them. We conclude therefore that the Commission had jurisdiction." (156 F. Supp. at 717, 718.)

Furthermore, the extensive findings of the District Court quoted in the section of this brief immediately preceding show the consideration the District Court gave to the jurisdictional question.

The District Court did not say it had no power to review the Commission's findings on jurisdiction. Furthermore, the District Court said nothing inconsistent with the difference in the scope of review of administrative action involving the exercise of discretion and administrative expertise as distinguished from the scope of judicial review in matters involving jurisdiction. The Court below as well as appellants and appellees in this proceeding recognize these distinctions and there is nothing inconsistent in the action of the Court below with these principles.

The question whether the proposed track is an "extension" is a mixed question of law and fact. *United States* v. *Idaho*, 298 U.S. 105. The jurisdiction of the Commission is thus based upon its findings to which it has applied the law. With the advent of *Gray* v. *Powell*, 314 U.S. 402, this Court commenced a line of decisions that narrowly restricted the power of a court reviewing an administrative action, even with respect to questions that would appear to be more legal than factual.

Appellants urge that the District Court should have conducted what in fact would be a trial *de novo* on the

facts relating to jurisdiction and then determine if the Commission had jurisdiction. It is not necessary in this proceeding to decide, as a pure question of law, whether the District Court has this power. However, assuming that the District Court does have the power to make any inquiry it desires into the facts relating to jurisdiction, it is not error for the District Court on this mixed question of law and fact to take the undisputed findings of fact by the Commission, based upon substantial evidence on the record as a whole, and refuse to overturn these facts or make an independent determination that the facts are as stated by the Commission. The position of the District Court is not inconsistent with the findings of this Court in *United States* v. *Idaho*, 298 U.S. 135 (1936), *East Texas Lines* v. *Frozen Food Exp.*, 351 U.S. 49, 54 (1956), or *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946).

In this proceeding the appellants went first to the Commission for an adjudication of jurisdiction, and are now claiming that the Commission's findings on jurisdiction have no significance so far as the District Court is concerned. On the mixed question of law and fact the expertise of the Commission in applying the law to the facts in the technical field of railroad regulation should be given very great weight by the Court when the findings are as complete and the evidence supporting them so substantial as it is in this case.

In *Yonkers* v. *United States*, 320 U.S. 685, this Court recognized that the Commission has special competence to deal with transportation problems; and held that the Commission must make jurisdictional findings before it undertakes to act on the merits; which findings give to the reviewing courts the

assistance of an expert judgment on a knotty phase of a technical subject.

In the present case the District Court has, in effect, said that since the Commission had made such complete findings of the facts upon which the jurisdictional issue must be resolved, and since these findings are supported by substantial evidence and not in dispute, that therefore the District Court would accept the Commission's findings. In effect, the District Court adopted the findings of the Commission and the application of the law thereto by the Commission. This course by the District Court was perfectly proper and not, as appellants contend, a refusal of the District Court to make an independent determination on jurisdiction. The District Court was in fact making this determination by accepting the findings of fact and conclusions of law of the Commission.

Acceptance of appellants' argument would render the expertise of administrative agencies a nullity. If reviewing courts could not accept the findings and conclusions of administrative agencies when they were found to be supported by substantial evidence, there would be little need for the administrative agency to make any determination on jurisdiction. In each case the burden of making an independent determination of jurisdiction would be thrown upon the court. Such a result would be contrary to existing laws and judicial determinations of the scope of review of the action of administrative agencies. This does not mean that the courts do not retain full jurisdiction to set aside administrative determinations of jurisdiction if the court finds such administrative determination is clearly erroneous. However, if the findings of fact

on jurisdiction are complete and the application of the law thereto is in accord with established judicial principles, there is certainly no need for a reviewing court to make an independent determination of the facts as found by the administrative agency.

## CONCLUSION

The court below subjected the Commission's orders to meticulous review. The court's opinion amply demonstrates this. It is respectfully submitted that the decision below, sustaining the orders of the Interstate Commerce Commission, is correct and that this appeal presents no substantial question. The judgment of the District Court should be affirmed.

Respectfully submitted,

HENRY L. WALKER,
ARTHUR J. DIXON,
JAMES A. BISTLINE,
Southern Railway Building,
P. O. Box 1808,
Washington 13, D. C.,
*For Appellees.*